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# **To Complicity...and Beyond! Passive Assistance and Positive Obligations in International Law**

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## **Abstract**

*Despite an apparent determination by the International Court of Justice that complicity under Article 16 ASR can only result from positive acts, it will be argued that a State may be responsible for complicity through passive assistance. Though complicity by omission has received academic acknowledgement, the concept is unduly restricted; posited as contingent on a pre-existing positive obligation to act, and thus necessarily entailing a violation of this primary norm. If this is so, complicity creates a duality of responsibility and is arguably rendered redundant, as it will always be easier to show that a State violated this positive obligation, than successfully leap the many hurdles of Article 16 ASR. This understanding of passive complicity will be challenged on a number of grounds, ultimately leading to the assertion that international law does recognise a useful concept of passive assistance, distinct and untethered from positive obligations. This is termed 'complicity by inaction' – passive assistance that is not per se wrongful.*

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## 1 Introduction

The treatment of terrorist suspects in the aftermath of 11 September 2001 has raised challenging questions concerning the responsibility of States for participation in the internationally wrongful acts of others.<sup>1</sup> Recent reports have substantiated claims of ill-treatment, and revealed an extensive clandestine cooperation network involving over a quarter of all UN States. In summarising these findings, a UN Special Rapporteur described the active and passive assistance given to the CIA rendition, detention, and torture programme: “CIA black sites had been located on the territory of Lithuania, Morocco, Poland, Romania and Thailand, and the officials of at least 49 other States within and outside the Council of Europe had allowed their airspace or airports to be used for rendition flights”.<sup>2</sup> Whilst the granting of these ‘overflight rights’ is capable of constituting complicity,<sup>3</sup> what is the position if a State is passive, and instead of positively granting rights, merely acquiesces, and with knowledge of the user’s illegal purpose does not object to the use of their airspace?<sup>4</sup> Is a pre-existing positive obligation, owed by the prospective ‘assister’ to prevent the wrongful objective, significant for the purposes of establishing complicity? In other words, if complicity by omission is possible, is it contingent on the breach of a positive obligation? And would such a position exclude the prospect of recognising complicity by inaction, where the act of assistance is otherwise lawful? As complex and covert cooperation systems expand and multiply, a rigidly bilateral approach to

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<sup>1</sup> H. P. Aust, *Complicity and the Law of State Responsibility*, (Cambridge, CUP, 2011), at pp. 1, 115–227. M. Milanovic, *Extraterritorial Application of Human Rights Treaties*, (Oxford, OUP, 2011), at pp. 124–126. V. Lanovoy, ‘Complicity in an Internationally Wrongful Act’, in Nollkaemper and Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art*, (Cambridge, CUP, 2014) p.155.

<sup>2</sup> *Al Nashiri v. Poland*, 24 July 2014, ECHR, no. 28761/11, at para. 481.

<sup>3</sup> Aust, *supra* note 1, at pp. 115 – 128; Lanovoy, *supra* note 1, at p. 147. Though the issue is not ‘black and white’: *Edward Horgan v. An Taoiseach and others*, 2003, Irish High Court, Application for Declaratory Relief, no. 3739P, para. 174.

<sup>4</sup> The issue of passive complicity was raised briefly, but not dealt with comprehensively in *Al Nashir v. Poland*: see the submission by the International Commission of Jurists and Amnesty International as a third party intervener, *supra* note 2, para. 448. See also: *Husayn (Abu Zubaydah) v. Poland*, 24 July 2014, ECHR, no. 7511/13, paras. 421 – 424, 443 - 444; *El-Masri v. The Former Yugoslav Republic of Macedonia*, 13 December 2012, ECHR, no. 39630/09, para. 239.

responsibility looks increasingly inapt, and the answers to these questions gain heightened importance for the continued legitimacy of the international legal order.<sup>5</sup>

Complicity, as codified in Article 16 of the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts,<sup>6</sup> imposes responsibility on States that aid and assist breaches of international law. A traditional understanding of complicity (*i.e.* by commission) imposes limited responsibility, but is somewhat underdeveloped. As is evidenced by the impunity with which States assisted in CIA rendition, complicity only partly addresses a disparity in legal and moral responsibility, and is unable to adequately assuage concerns over accountability.<sup>7</sup> The concept of complicity through omission has the potential to yield a more comprehensive and equitable imposition of State responsibility, emphasising and expressing a more robust denunciation of contributions to wrongful acts.

Despite the absence of acknowledgement in Article 16 ASR, and claims by the International Court of Justice that complicity can only be committed by positive acts,<sup>8</sup> it will be argued that States can incur responsibility for complicity by omission.<sup>9</sup> In order to do so, some authors suggest, a pre-existing obligation to act must be incumbent on that State,<sup>10</sup> and thus any passivity necessarily entails a violation of this primary norm. In such situations, complicity has been said to be rendered redundant as it will always be easier to show that a State violated its due diligence

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<sup>5</sup> A. Nollkaemper, 'Introduction', in Nollkaemper and Plakokefalos (eds.) *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art*, (Cambridge, CUP, 2014), p. 4; Lanovoy, *supra* note 1, p. 134.

<sup>6</sup> Annexed to General Assembly Resolution 56/83. Hereinafter 'ASR'.

<sup>7</sup> V. Lowe, *International Law*, (Oxford, OUP, 2007), p. 121.

<sup>8</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, at p. 43, para. 432. Hereinafter '*Bosnia v. Serbia*'. Similar conclusions have been reached at the ICTR: *Prosecutor v. Akayesu*, 1998, ICTR-96-4T, para. 548. See also: J. Crawford, *State Responsibility: The General Part*, (Cambridge, CUP, 2013), p. 403.

<sup>9</sup> Nolte and Aust, 'Equivocal Helpers: Complicit States, Mixed Messages and International Law', 58 *International and Comparative Law Quarterly* (2009), p. 10; M. Milanovic, 'State Responsibility for Genocide: A Follow up', 18 *The European Journal of International Law* (2007), p. 687; A. Gattini, 'Beach of Obligations to Prevent and Reparation Thereof in the ICJ's Genocide Judgment', 18 *The European Journal of International Law* (2007) p. 703; K. Nahapetian, 'Confronting State Complicity in International Law', 7 *UCLA Journal of International Law and Foreign Affairs*, (2002) p. 122.

<sup>10</sup> Aust, *supra* note 1, p. 227; Lanovoy, *supra* note 1, p. 147.

obligations, than successfully leap the many hurdles of Article 16.<sup>11</sup> This position will be challenged on a number of grounds.

First, by examining the concept of complicity by omission, this article seeks to ascertain the contours of Article 16 ASR, assessing whether omissions are necessarily excluded from its purview. Recent scholarship, whilst mooted the possibility of complicity by omission, has failed to address the issue comprehensively, veering into a discussion of positive obligations. But this misses the salient issue: the causation based nature of the material element highlights the problematic tension between omissions and causation with which other legal regimes have grappled. The material element of Article 16 does not exclude omissions, *per se*; it merely requires a causative link which is difficult, but not impossible, to establish by omission.

Secondly, the claims that complicity by omission is possible only where the complicit action also violates a pre-existing positive obligation will be examined. The existence of a positive obligation may increase the moral culpability of the inaction, but given that complicity through omission may fail to meet the material, not subjective element, how can positive obligations provide the necessary cure for this causative deficiency? Additionally, there are many conceptual differences between positive obligations and complicity by omission, but if the former are necessary to facilitate responsibility for the latter, are the two concepts in danger of merging?

Thirdly, this article will seek to take the rationale of complicity one step further, and speculate on the possibility of complicity by a different form of passivity: by omission in the absence of a positive obligation, or ‘inaction’. ‘Omission’ assumes a prior duty to act, and that the State, by not acting, has failed in this obligation; “a doing contrary to a norm is a commission, a non-doing is an omission”.<sup>12</sup> ‘Inaction’, conversely, is a neutral term, which does not presuppose a legal obligation to act. ‘Complicity by inaction’ could engage responsibility where the would-be complicit State’s inaction is lawful *per se*, but engages responsibility where this inaction contributes to an internationally wrongful act. Though seemingly controversial, this should be the aim of a functional derivative responsibility regime.

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<sup>11</sup> Corten and Klein, ‘The Limits of Complicity as a Ground for Responsibility’, in Bannelier *et al* (eds.), *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case*, (London, Routledge, 2012), p. 331.

<sup>12</sup> T. Honore, ‘Are Omissions Less Culpable?’ in Cane and Stapleton, *Essays for Patrick Atiyah* (Oxford, Clarendon Press, 1991) p. 33.

Throughout the examination of the concept of complicity by omission, reference will be made to the fictional scenario, provided below:

State X plans to carry out an attack against State Z in violation of Article 2(4) UN Charter.<sup>13</sup> State Y is a State geographically located between X and Z. Consider these three alternative scenarios:

- a) In order to carry out this attack, X's planes must refuel in Y. Y, knowing of X's purposes, grants permission for X's planes to refuel *en route* to attacking Z. X attacks Z.
- b) In order to carry out the attack, X must fly through the airspace of Y. Y has ratified a treaty establishing a common security and defence policy with Z providing, *inter alia*, that Y will work to prevent attacks on Z. Y is aware of X's purposes and does not object to X using Y's airspace. X attacks Z.
- c) In order to carry out the attack, X must fly through the airspace of Y. Y is aware of X's purposes but does not object to X using Y's airspace. X attacks Z.

These scenarios correspond to complicity by action, complicity by omission, and complicity by inaction, respectively. Drawing upon the prior discussion, this article will assess State Y's responsibility for complicity under Article 16; providing a vivid demonstration of the distinctive, yet complementary natures of complicity by omission, complicity by inaction, and positive obligations in international law. Ultimately, this article submits that complicity should impose responsibility in all three scenarios.

## 2 Complicity

### 2.1 History of the Concept in International Law

Complicity concerns the wrongfulness of contributing to the wrongful act of another; it is recognised in criminal law regimes, finding expression in the prohibition of aid and assistance.<sup>14</sup>

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<sup>13</sup> This scenario is employed solely to demonstrate the mechanics of the law of State responsibility, and thus it shall be assumed that this attack results in the commission of an internationally wrongful act in violation of Article 2(4) UN Charter. Related use of force issues and controversies in the Charter rules on the use of force will not be addressed in this paper.

<sup>14</sup> M. Jackson, *Complicity in International Law*, (Oxford, OUP, 2015) pp. 10 - 11.

It is derivative in the sense that the wrongfulness of the actions of the assister is derived from the wrongfulness of the actions of the principal,<sup>15</sup> though various legal systems offer distinctive conceptualisations of this relationship. Common law systems tend to view complicity as imputational, with the result that the assister is treated as having committed the act of the principal.<sup>16</sup> Civil law systems, by contrast, view complicity as non-imputational – the acts of complicity are penalised as exactly that – acts of complicity in the wrongful act of another. This latter model reflects the approach of Article 16 ASR.<sup>17</sup> Complicity notes the effect that States are able to have on the commission of internationally wrongful acts by others, and enforces the axiom that “I am responsible for my actions”, recognising that “my own actions inevitably include my actions of contributing to your actions”.<sup>18</sup> Thus, the concept acknowledges assistance as indirect causal contributions to the harm caused by the principal.

### 2.1.1 Article 16 ASR

There was a certain unease surrounding complicity in the early drafts of the ASR; though contained in Article 25, it was seen to represent progressive development, rather than codification of the law.<sup>19</sup> This is somewhat surprising given that the concept had, in essence, received judicial attention nearly 30 years previous in the *Corfu Channel* case.<sup>20</sup> Though recently

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<sup>15</sup> Various terms are employed to refer to the roles, including secondary and primary, accessory and principal, accessory and perpetrator. This paper shall use ‘assister’ and ‘principal’.

<sup>16</sup> Thus, in England and Wales, an accomplice to murder is a murderer: Section 8, the Accessories and Abettors Act 1861. See: Jackson, *supra* note 14, pp. 18–21.

<sup>17</sup> ASR Commentary, Article 16, at para 10.

<sup>18</sup> J. Gardner, ‘Complicity and Causality’ 1 *Criminal Law and Philosophy*, 2007, p. 132.

<sup>19</sup> R. Ago, *Seventh Report on State Responsibility*, (A/CN.4/307 and Add.1–2), in Yearbook of the ILC 1978, vol. II (1), para. 74.

<sup>20</sup> *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment of April 9th, 1949: I.C. J. Reports 1949, at p. 4, para. 22. Hereinafter ‘*Corfu Channel*’. Corten and Klein, *supra* note 11, p. 318. Aust, Complicity, *supra* note 1, p. 227. For a view that the ICJ was actually dealing with joint responsibility, not complicity see: Crawford, *supra* note 8, p. 405.

accepted by the ICJ as having achieved customary status,<sup>21</sup> there remain questions over the precise contours of complicity.<sup>22</sup>

From its introduction in draft Article 25, to its contemporary conception in Article 16 ASR, there were few conceptual alterations to the provision. The terms ‘accessory’ and ‘third State’ were discarded,<sup>23</sup> the subjective link between the assistance and the primary wrong was strengthened,<sup>24</sup> and the opposability requirement was added;<sup>25</sup> but there was no change in the underlying rationale. Complicity functions to attach responsibility to acts which are *prima facie* permissible, but acquire a character of wrongfulness due to their contribution to the commission of an internationally wrongful act by another. Thus, Article 16 sits rather uncomfortably within ARISWA, being, in truth, not a secondary norm, owing to its ability to confer responsibility.<sup>26</sup>

In international law, complicity is related to, but conceptually distinct from, other forms of liability such as shared and joint responsibility.<sup>27</sup> Shared responsibility, as understood by the University of Amsterdam SHARES project, is defined by three key features: the responsibility of multiple actors, for their contribution to a single outcome, where responsibility is distributed between the actors separately.<sup>28</sup> Complicity, being premised on an understanding of individual

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<sup>21</sup> *Bosnia v. Serbia*, *supra* note 8, at para. 420.

<sup>22</sup> Aust, *supra* note 1, at p. 100. Crawford, *supra* note 8, at p. 405. As a comprehensive examination of the customary status of the elements of complicity is beyond the scope of this paper, Article 16, though not a formal source of law, shall be taken as representative of law regarding complicity.

<sup>23</sup> Compare: Ago, Seventh Report, *supra* note 19, at para. 77, and Article 16 ASR.

<sup>24</sup> From “in order to help that State commit an internationally wrongful offence”, to “if it is established that it is rendered for the commission of an internationally wrongful act”. Ago, Seventh Report, *supra* note 19, para. 60; and Yearbook of the ILC 1978, vol. I, (A/CN.4/SER.A/1978), p. 269, para. 2.

<sup>25</sup> Providing for complicity only in situations where “the act would be internationally wrongful if committed by that State”. Compare: Ago, Seventh Report, *supra* note 19, para. 60; Yearbook of the ILC 1978, vol. I, (A/CN.4/SER.A/1978), p. 269, para. 2; and Article 16(b) ASR.

<sup>26</sup> Secondary rules are considered to be “The general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom.” They are distinct from primary rules, which “define the content of the international obligations, the breach of which gives rise to responsibility.” ASR General Commentary, para 1.

<sup>27</sup> Crawford, *supra* note 8, p. 399.

<sup>28</sup> Nollkaemper and Jacobs, Shared Responsibility in International Law: A Conceptual Framework, 34 *Michigan Journal of International Law* 2013, pp. 366–368.



(and possibly exclusive)<sup>29</sup> responsibility, constitutes a separate wrongful act and excludes genuine shared responsibility.<sup>30</sup> A further distinction can be made between shared responsibility and joint responsibility; the latter being a narrower approach to contributions to a single wrongful act, as enshrined in Article 47 ASR. Though there are arguably instances in which complicity and joint responsibility overlap, “where a State’s role is ancillary, it should be deemed complicit only”.<sup>31</sup> By contrast, joint responsibility requires a higher degree of participation. As a form of secondary liability, complicity is distinct from forms of liability in which all participants are vicariously liable for the acts of the others,<sup>32</sup> thus excluding cases of State ‘co-perpetration’.<sup>33</sup>

The final provision on complicity, in Article 16 ASR, reads as follows:

“A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- a) That State does so with knowledge of the circumstances on the internationally wrongful act; and
- b) The act would be internationally wrongful if committed by that State.”

### **2.1.2 Specific Complicity Rules and Article 16 ASR**

A distinction should be maintained between a general prohibition of complicity, such as is found in Article 16 ASR, and more targeted, specific prohibitions. Certain areas of international law contain such provisions, which have an analogous effect to that of Article 16. One such area is the use of force, where acts of assistance, which could otherwise be characterised as wrongful under Article 16, potentially incur responsibility under a variety of other rules pertaining to

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<sup>29</sup> *Ibid.*, at p. 384.

<sup>30</sup> Lanovoy, *supra* note 1, at p. 150.

<sup>31</sup> J. Quigley, ‘Complicity in International Law: A New Direction in the Law of State Responsibility’, 57 *British Yearbook of International Law* 1986, p. 106.

<sup>32</sup> *Ibid.*

<sup>33</sup> Yearbook of the ILC, 1978, Vol. II, Part II, at p. 99, para. 2. (A/CN.4/SER.A/1978/Add.I (Part 2)); ASR Commentary, Article 16, at para 1.

assistance in the use of force specifically. Article 3(f) of the Definition of Aggression,<sup>34</sup> relevant UN Security Council decisions either in and of themselves or in conjunction with Article 2(5) UN Charter, Article 41(2) ASR, and positive obligations arising from the *Corfu Channel* case, may render the actions of assistance illegal, without the need for recourse to Article 16.<sup>35</sup> Similarly, in international humanitarian law, common Article 1 Geneva Conventions, and in human rights law, Article 2(1) ICCPR, like the *Corfu Channel* case, impose positive obligations on States.<sup>36</sup> The interaction of positive obligations and Article 16 complicity will be analysed in detail in section two. This article will not deal with norm specific provisions such as Article 3(f) of the Definition of Aggression, and will limit itself to consideration of Article 16.

In a sense, these specific complicity regimes partially detract from the utility of a secondary rule of general application, as the specific rules concern the same conduct and circumvent “the deficiencies which are attached to Article 16”.<sup>37</sup> It is worth noting, however, that despite the existence of these specific provisions Article 16 remains a valuable rule, offering a ‘baseline’ prohibition of assistance that maintains significance due its universal norm coverage and the relative paucity of specific provisions in other areas.<sup>38</sup>

## 2.2 Omissions in Article 16

This section will examine whether Article 16 excludes the possibility of complicity by omission. In doing so it shall consider whether omissions are necessarily incapable of satisfying any of the constituent parts of Article 16, but first it is necessary to delineate the meaning of ‘omission’.

### 2.2.1 Omissions Liability

Liability for a failure to act can arise under the guise of different legal concepts, and certain types of liability often deceptively appear as omissions. In order to pinpoint the exact meanings of

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<sup>34</sup> United Nations General Assembly Resolution (XXIX), *The Definition of Aggression*, (A/RES/29/3314).

<sup>35</sup> Corten and Klein, *The Limits of Complicity*, *supra* note 11, at p. 380. For a definition and discussion of positive obligations arising out of the *Corfu Channel* case see section 2.3.

<sup>36</sup> Marco Sassoli, ‘State Responsibility for Violations of International Humanitarian Law’, 84 *International Review of the Red Cross* 2002, p. 413.

<sup>37</sup> Aust, *supra* note 1, p. 416.

<sup>38</sup> *Ibid.*

complicity by omission and complicity by inaction, a distinction between direct omission responsibility, commission by omission, complicity by action, complicity by omission, and complicity by inaction is necessary. Direct omission responsibility arises where passivity is prohibited by a specific rule. The Geneva Conventions, for example, impose positive obligations on States. Where a State fails to fulfil these positive obligations they are directly responsible for their omission. Responsibility for commission by omission can arise when the primary rule is negative, but there is a special relationship justifying the imposition of liability for omissions. A parent allowing a child to starve to death may be considered liable for murder. Complicity by action is the traditional conception of Article 16; it arises where a State provides positive acts of assistance to another in order for that State to commit an internationally wrongful act. This situation is illustrated by Scenario A. Complicity by omission is an altogether more difficult concept. As illustrated by Scenario B, it arises where there is a pre-existing positive obligation incumbent on the State, and that State, in failing to fulfil this duty, facilitates the commission of an internationally wrongful act. As will be shown, complicity by omission has received negative judicial treatment, and the existence and viability of the concept has not yet received categorical, unqualified academic endorsement. Complicity by inaction is merely a theoretical possibility raised by this article. It would arise where a State knowingly acquiesces, and without breaching a positive obligation, allows another State to breach an obligation owed to that State, in order to commit an internationally wrongful act against a third State. Complicity by inaction is illustrated by Scenario C. If the law of State responsibility accepts that omissions are able to satisfy the material element of complicity under Article 16, then there appears to be no reason why culpable complicity by inaction may not also engage responsibility.

### **2.2.2 The Current Position of Omission Liability in the Law of State Responsibility**

Article 16 and its Commentary do not mention omissions. This is perhaps surprising given that previous ILC reports noted that cases of omission responsibility “are at least as numerous as those based on positive acts, and no difference in principle exists between the two”.<sup>39</sup> Rather than interpreting the absence as indicative of an intention to exclude the possibility of complicity by omission, the better view is that “the ILC saw no reason to deviate from its general rule,

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<sup>39</sup> ASR Commentary, Article 2, at para. 4.

namely that State conduct can consist of an action or an omission”.<sup>40</sup> Indeed, the interplay between complicity and responsibility arising from omissions had been discussed by the ILC during the drafting process, so the issue could not have been beyond their contemplation.<sup>41</sup> The ICJ has interpreted complicity as necessarily involving positive acts, holding that: “complicity always requires that some positive action is taken ... while complicity results from commission, violation of the obligation to prevent results from omission”.<sup>42</sup> Whilst the robustness of this determination is beyond dispute, its relevance to Article 16 is questionable. In *Bosnia*, the Court was primarily engaged in interpreting the Genocide Convention, and even if it was interpreting Article 16, it did so having transposed the exclusion of complicit omissions from the complicity provision in the Genocide Convention.<sup>43</sup> Thus, this limitation may not apply at all to Article 16,<sup>44</sup> and without a definitive pronouncement on the potential for complicity by omission, consideration of an omission’s theoretical capacity to satisfy the requirements of Article 16 is necessary.

Article 16 is commonly seen as consisting of three parts: the material element, the subjective element, and the opposability requirement.<sup>45</sup> The material element is concerned with the types of acts that may constitute complicity; the subjective element refers to the requisite mental state of the assister; and the opposability rule requires that the norm violated was also owed by the assister.

## 2.3 The Material Element

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<sup>40</sup> Aust, *supra* note 1, p. 227.

<sup>41</sup> ASR Commentary, Article 16, at para. 2. *See also*: Ago, Seventh Report, *supra* note 19, at para. 57.

<sup>42</sup> *Bosnia v Serbia*, *supra* note 8, para. 432.

<sup>43</sup> Crawford, *supra* note 8, at pp. 403–405.

<sup>44</sup> V. Lanovoy, ‘Responsibility for Complicity in an Internationally Wrongful Act: Revisiting a Structural Norm’, paper presented at the SHARES Conference ‘Foundations of Shared Responsibility in International Law’, 18 November 2011, p. 12. <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2170406](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2170406)> last visited 17/03/16

<sup>45</sup> Crawford, *supra* note 8, pp. 401 – 410; Lanovoy, *supra* note 1, pp. 140 - 141; Aust, *supra* note 1, p.194. Or, alternatively: the conduct element, the nexus between the assistance and the principal’s wrong, the fault of the assister, and the double obligation requirement. Jackson, *supra* note 14, at p. 153.

Throughout the drafting process of complicity, the aid or assistance was primarily defined by reference to its link to the wrongful act, rather than the inherent character of the assistance.<sup>46</sup> It appears that “all kinds of aid and assistance fall within the rule”, and that the key question is “what is the required relationship between the aid and assistance, and the wrongful act of the assisted State?”<sup>47</sup> Adopting what is essentially a causality-based test, the ILC provides only the briefest of guidance, stating that the assistance need not be “essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act”.<sup>48</sup> The absence of a quality-based limitation suggests that even the most minimal conduct would be sufficient so long as it contributed significantly to the wrongful act.<sup>49</sup> Thus, the provision of food supplies for humanitarian purposes cannot amount to complicity in a use of force.<sup>50</sup> Here then, one may note the introduction into international law of a problem with which domestic systems, as well as international criminal law, have grappled, namely, whether omissions count as causes.<sup>51</sup> It is this causation issue that is decisive in assessing whether complicity by omission is possible.

### 2.3.1 Passivity and Causation

If omissions can count as causes, then they are capable of constituting the material element of complicity. In addition to the other legal regimes that have confronted this challenging issue, much has been written on this topic in theoretical and philosophical terms.<sup>52</sup>

Causation, in a rudimentary sense, is determined by a ‘but for’ test which relies on the counterfactual;<sup>53</sup> what is crucial is that “had you done something else, the wrongdoing would not have occurred”.<sup>54</sup> In this sense, an omission can clearly contribute to a wrongful act. Taking

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<sup>46</sup> B. Graefrath, ‘Complicity in the Law of International Responsibility’, 2 *Revue Belge de Droit International* 1996, p. 374.

<sup>47</sup> Jackson, *supra* note 14, p. 154.

<sup>48</sup> ASR Commentary, Article 15, para. 5.

<sup>49</sup> Lanovoy, *supra* note 1, p. 144. Crawford, *supra* note 8, p. 402.

<sup>50</sup> Yearbook of the ILC 1978, vol. I, *supra* note 24, para. 239.

<sup>51</sup> Lepora and Goodin, *On Complicity and Compromise*, (Oxford, OUP, 2013), p. 46.

<sup>52</sup> E. Weinryb, ‘Omissions and Responsibility’, 30 *The Philosophical Quarterly*, 1980, p. 2.

<sup>53</sup> Gattini, *supra* note 9, p. 709.

<sup>54</sup> Lepora and Goodin, *supra* note 51, p. 45.

Scenario B, we can see that had State Y objected to State's X use of its airspace, there would have been no attack on State Z. Therefore State Y's omission was a cause of the internationally wrongful act of State X, thus satisfying the material element of aid and assistance. To view omissions in this way is to treat omissions as no more than a certain type of action, and yields little difficulty in establishing that they have consequences.<sup>55</sup> Alternatively, omissions have been distinguished from action, and as a result, been characterised as absent causal consequences; on this view, they are "merely the absence of a preventive anti-cause".<sup>56</sup> Other authors have focused on this issue in moral terms; opining that "the moment we realize that harm to human beings could be prevented, we are entitled to see the failure to prevent it as a cause".<sup>57</sup> In the context of Article 16, this approach would see a widening of the material element, and a utilisation of the subjective element as a limiting factor. But subjective elements have their own unique issues in international law, and this approach could therefore be said to be unworkable.<sup>58</sup> In sum, the scholarship in this area does not provide a definitive answer.

### 2.3.2 Legal Treatment of Passivity as Assistance

This section will consider the treatment of passivity in law in order to discover whether other regimes accept passivity as a form of action.<sup>59</sup> Domestic conceptions of the omissions liability differ greatly; the tort law of England and Wales does not recognise liability for passivity except in circumstances where there is some prior obligation to act,<sup>60</sup> whereas the French criminal law penalises such failures to act with possible imprisonment.<sup>61</sup> In international criminal law, liability for aiding and abetting can accrue by omission in limited circumstances. There is no liability for inaction however; the accused must have been obliged to prevent the crime from being brought

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<sup>55</sup> J. Bentham, *An Introduction to the Principles of Morals and Legislation*, (Oxford, Clarendon Press, 1907) p. 72. Though, note that this view has received some criticism: Weinryb, *Supra* note 52, at p. 2.

<sup>56</sup> H. V. McLachlan, 'The Ethics of Killing and Letting Die: Active and Passive Euthanasia', 34(8) *Journal of Medical Ethics* 2008, pp. 636–639.

<sup>57</sup> J. Harris, 'The Marxist Conception of Violence', 3 *Philosophy and Public Affairs* 1974, p. 204.

<sup>58</sup> See section 2.4. See also: Quigley, *supra* note 31, p. 111.

<sup>59</sup> It does so with a caveat: criminal law, in particular, has a theoretically distinct underpinning, and thus is of limited use. The author does not seek to draw broad comparisons between international law and criminal law.

<sup>60</sup> For example, see: *Smith v Littlewoods Organisation Ltd* [1987] 2 AC 241, at p. 270; section 4.2.

<sup>61</sup> French Criminal Code articles 223–226.

about.<sup>62</sup> Thus, these regimes do not recognise liability for passivity in and of itself; such liability arises only where there is a special factor (usually a relationship) justifying the imposition of liability. Similarly, in international law, responsibility may be incurred by an omission in the breach of a positive obligation. Increasingly, scholars are departing from a conventional position which restricts complicit conduct to acts alone, and are recognising that omissions may also be relevant to complicity on the basis that “omissions do assist in the commission of wrongdoing”.<sup>63</sup> This seems in keeping with the State practice on the issue. The UK Parliament’s Joint Committee on Human Rights, regarding allegations of UK complicity in torture, for example, held that complicity in torture entails provision of “assistance to another State in the commission of torture, or acquiescing in such torture”.<sup>64</sup> In discussing the material element of Article 16, authors have drawn on a wide range of State practice, much of which demonstrates objections, on legal grounds, to omissions which aid and assist a separate wrongful act.<sup>65</sup>

Whilst it appears that it will be difficult for an omission to meet the causation requirement, it is increasingly recognised that omissions are not excluded from satisfying the material element of Article 16.

## 2.4 The Subjective Element

Though the text of Article 16 only requires that the assisting State assists with “knowledge of the circumstances”, the Commentary seems to impose an intent requirement, stating that the assistance “must be given with a view to facilitating the commission of that act, and must actually do so”.<sup>66</sup> This appears to be in conflict with a later comment that, unless the primary

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<sup>62</sup> *Oric*, 30 June 2006, ICTY Trial Chamber II, para. 283. *See also: Mulutinovic et al.*, 26 February 2009, ICTY Trial Chamber III, para. 90; A superior’s presence may engage responsibility through tacit approval: *Aleksovski*, 24 March 2000, ICTY Appeals Chamber, paras. 36–37; *Bradantin and Talic*, 3 April 2007, ICTY Appeals Chamber, at para. 273. Command responsibility, similarly, is premised on a superior relationship and obligation to prevent or punish: Article 28 Rome Statute of the International Criminal Court 1998.

<sup>63</sup> Jackson, *supra* note 14, p. 156. *See also: Lanovoy*, Revisiting, *supra* note 44, p. 11.

<sup>64</sup> Joint Committee on Human Rights, Allegations of UK Complicity in Torture (2008 – 09) HL Paper 152, HC 230, at para. 35. <<http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/152/152.pdf>> last accessed 17/03/16.

<sup>65</sup> Most comprehensively: Aust, *supra* note 1, pp. 107–174. *See also: Quigley*, *supra* note 31, pp. 81–107.

<sup>66</sup> ASR Commentary, Article 16, para. 3.

obligation requires intent “it is only the act of the State that matters, independently of any intention”.<sup>67</sup> This perceived ‘*culpa* requirement’ has attracted academic criticism for being unworkable, and depriving the concept of complicity of much of its usefulness.<sup>68</sup> These criticisms, in addition to lamenting a lack of clarity, generally relate to the difficulty of ascribing intention to States;<sup>69</sup> a problem which is heightened when applied to omissions, as it is even more difficult to show that a State’s passivity was intended to facilitate the actions of another.

In addressing the internally inconsistent approach to the subjective element in ASR, authors have offered a variety of interpretations. Relying on another ILC comment, which notes that the subjective element limits Article 16 to “cases where the aid or assistance given is clearly linked to the subsequent wrongful conduct”,<sup>70</sup> the provision has been interpreted as ensuring a contribution to the wrongful act.<sup>71</sup> But given the content of the material element of Article 16, this understanding appears to cause a superfluous duplication, rendering the subjective element redundant. Alternative interpretations attempt to reconcile the ILC’s comments by ignoring any distinction between purpose and knowledge, with the result that “a State providing aid with knowledge of intended wrongful use” would satisfy the subjective element.<sup>72</sup> This latter view finds support in the earlier comments of Robert Ago, that complicity “necessarily presupposes intent to collaborate ... (and hence) knowledge of the specific purpose (of the receiving State)”.<sup>73</sup> A third view is that the level of knowledge or intent could be dictated by reference to the primary norm violated. In the extreme, this view would see complicity “limited to violations of international law which adversely affect the international community as a whole”.<sup>74</sup> Aust offers a more conservative suggestion which would entail “a less rigorous requirement of knowledge and

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<sup>67</sup> *Ibid.*, Article 16, para. 10.

<sup>68</sup> Quigley, *supra* note 31, p. 111. A. Boivin, ‘Complicity and Beyond: International law and the Transfer of Small Arms and Light Weapons’, 87 *International Review of the Red Cross*, 2005, p. 471. K. Nahapetian, *supra* note 9, pp. 109–110. Graefrath, *supra* note 46, p. 374; Lanovoy, *supra* note 1, at p. 152.

<sup>69</sup> Aust, *supra* note 1, at p. 241.

<sup>70</sup> ASR, Article 16, para. 5.

<sup>71</sup> Boivin, *supra* note 76, p. 471.

<sup>72</sup> Quigley, *supra* note 31, at p. 113.

<sup>73</sup> Ago, Seventh Report, *supra* note 19, para. 72.

<sup>74</sup> Graefrath, *supra* note 46, p. 378.



intent [to] be found in the regime of serious breaching of peremptory rules”.<sup>75</sup> Therefore, Aust suggests, a due diligence standard for complicity would be appropriate where a foreign State uses a host’s territory to violate human rights obligations.<sup>76</sup> As it may be more difficult to show that a State intended to facilitate by passivity, a strict intent requirement may weaken the position of complicity by omission. But as no such interpretation has received wide endorsement, there is nothing in the subjective element which excludes the possibility of complicity by omission.

## 2.5 The Opposability Requirement

This element has attracted academic attention, being perceived as an unfortunate concession to bilateral sympathies.<sup>77</sup> Whilst certainly a restrictive, limiting requirement, it does not have any special relevance to complicity by omission.

## 3 Positive Obligations and Complicity by Omission

Having established that nothing in Article 16 excludes omissions from constituting complicity, it is clear that complicity by omission is, at least, theoretically possible. This article will now examine the concept’s relationship with positive obligations. It shall approach this issue by addressing two primary questions: does complicity by omission rely on the violation of positive obligations? And if so, is the notion useful, given the duality of responsibility that necessarily results?

### 3.1 Positive Obligations in International Law

In order to discharge negative obligations, States are only required to forbear from certain actions. Positive obligations, by contrast, require State action. Article 2(4) of the UN Charter obliges States to refrain from the use of force, and thus is negative; Article 2(1) ICCPR necessitates action in order to ‘ensure’ civil and political rights, and thus is positive. Whilst positive obligations encompass all norms which require actions for discharge of liability, this

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<sup>75</sup> Aust, *supra* note 1, p. 245. In a sense, this view finds support in: Lanovoy, *supra* note 1, at p. 155.

<sup>76</sup> Aust, *supra* note 1, at p. 245.

<sup>77</sup> Lanovoy, *supra* note 1, pp 160 - 161.

article deals only with obligations of prevention. Other positive obligations do not concern the actions of third parties and have no direct relevance to complicity. These include obligations to fulfil, emanating from human rights treaties.<sup>78</sup>

Obligations of prevention, or due diligence obligations,<sup>79</sup> can manifest themselves in two ways; the regulation of internal conduct, and the regulation of external actors. Internally, these norms operate in a manner that mimics or replicates negative rules. Thus, in *Armed Activities*, Uganda was found responsible for failing to exercise vigilance and prevent looting in territory it occupied when its own forces carried out the acts of looting.<sup>80</sup> Whilst these acts could have been committed by Uganda directly, an inability to attribute the conduct would not have prevented responsibility arising, due to the clear violation of the positive obligation to prevent.<sup>81</sup> Externally, these obligations oblige States to take action to regulate third party conduct. This third party may be an individual (as in the *Tehran Hostages* case),<sup>82</sup> a State (as was argued in *Corfu Channel*), or a natural event.<sup>83</sup> These external types of positive obligations, where the third party is a State, in essence, function as a form of primary derivative responsibility and have a similar role to complicity – in both cases the conduct (including passivity) is wrongful due to another State's action.

### 3.2 Positive Obligations and Facilitation of Complicity by Omission

This section challenges the view, noted above, that complicity by passivity is only possible where a positive obligation has been breached.<sup>84</sup> In the scenario provided, responsibility for

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<sup>78</sup> For example, Article 9(3) ICCPR requires State action in order to establish the necessary structure and process for the realisation of the right to a fair trial.

<sup>79</sup> So-called as in order to discharge obligations of prevention, a State must be duly diligent. See: *Bosnia v. Serbia*, *supra* note 8, at para. 430; ILA Study Group on Due Diligence in International Law, First Report, 7 March 2014, at p. 2. <[http://www.ila-hq.org/en/committees/study\\_groups.cfm/cid/1045](http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1045)> last accessed 17/03/16

<sup>80</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168, at paras. 245, 256.

<sup>81</sup> S. Heathcote, 'State Omissions and Due Diligence', in in Bannelier *et al* (eds.), *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case*, (London, Routledge, 2012), p. 310.

<sup>82</sup> *United States Diplomatic and Consular Staff in Tehran*, Judgment, I.C.J. Reports 1980, at p. 3.

<sup>83</sup> Heathcote, *supra* note 81, p. 310.

<sup>84</sup> Aust, *supra* note 1, p. 227; Jackson, *supra* note 14, p. 40.

complicity by omission can occur in Scenario B but not in Scenario C. Though the (in-)action is the same, the presence of a positive obligation to prevent, incumbent on State Y, means that responsibility for complicity by omission will arise in addition to responsibility flowing from the breach of the positive obligation.

### 3.2.1 Can Positive Obligations Facilitate Complicity by Omission?

The view that positive obligations are necessary to facilitate complicity by omission may appear justified where the two responsibilities are engaged by the same act. However, a slight nuance illustrates the merely technical importance of the co-incidence. The positive obligation need not concern the same content as the primary norm violated; the omission simply needs to be causally connected to the violation. In situations where the primary norm and the positive obligation relate to different content, it is unclear why there is a requirement of a breach of an obligation. Aust provides an illustrative example of this type of scenario: Israel requested permission from the US for a flight over US-controlled Iraqi territory in order to carry out an attack on Iran. The US, by virtue of the Status of Forces Agreement 2008, was under an obligation to consult the Iraqi government in the event of any external or internal threat which would violate Iraq's sovereignty. This obligation did not amount to a duty to take unilateral measures against Israel. If the US granted permission it would violate the positive obligations owed to Iraq under the Status of Forces Agreement, and *because of this*, US responsibility for complicity in the Israeli attack may be engaged.<sup>85</sup> If there was no such obligation, the US could not be held responsible for complicity in the Israeli attack on Iran. In a sense, this treaty has the effect of widening the scope of complicity, and facilitating responsibility under Article 16 where there would otherwise have been none. This is so even though the positive obligation does not relate to the use of force against Iran, but to a duty to inform Iraq before granting overflight rights. This example similarly demonstrates the merely technical function of this positive obligation prerequisite in another sense: not only did the positive obligation not refer to the same violation in which the US may have been complicit, but the positive obligation was also not owed to the victim State. The imposition of responsibility for complicity in this situation could be more easily justified if the US owed the positive obligation to Iran, or the Israeli attack was aimed at Iraq. But the lack of co-incidence exposes this rule as a merely formal requirement without doctrinal value; it is

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<sup>85</sup> Aust, *supra* note 1, at pp. 228–229.

difficult to see why a norm of a different content, owed to a different State, can create complicity where there otherwise would be none.

If the violation of positive obligations is a necessary precondition to complicity in such situations, then the law provides either an absence or a duality of responsibility. Either no primary violation occurred, in which case there can also be no complicity; or there was a primary violation, in which case there may also be complicity by omission. When a positive obligation is violated, responsibility for complicity by omission will accompany the responsibility flowing from the primary violation where the subjective and opposability requirements are met. This seems to reduce the role of complicity somewhat; it is still ancillary, but is more closely linked to the assister's wrongful omission than the principal's wrongful act.

### **3.2.2 Can Positive Obligations Address the Causation Issue?**

As noted above, the objective element of Article 16 is causation-based.<sup>86</sup> In the context of ongoing uncertainty as to whether omissions can truly have causes, it appears that there will be significant difficulty in showing that omissions can constitute complicity. Some authors and legal regimes seem to suggest that the causative issue concerning omissions is circumvented when a positive obligation is breached. On this view, omissions have consequences where there was a prior obligation to act; where “there is a duty to do something and you do nothing, your ‘doing nothing’ counts as a cause”.<sup>87</sup> If this is so, it provides strong support for the concept of complicity by omission; the view that positive obligations facilitate complicity by omission would aid the leaping of the causative hurdle that the objective element presents. But, it is submitted, this assessment misunderstands or ignores the distinct nature of these two responsibilities, and is based on a “confusion between issues of ‘causation’ on the one hand and issues of ‘duty’ on the other”.<sup>88</sup> There is, in fact, no material difference in the causative value of the omission in Scenario B and the inaction in Scenario C. Accordingly, the better view is that a “legal duty cannot transform an omission from a nothing that can cause nothing, to a nothing that

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<sup>86</sup> See section 1.3.

<sup>87</sup> Lepora and Goodin, *supra* note 51, at p. 46.

<sup>88</sup> J. Kortmann, *Altruism in Private Law – Liability for Non-Feasance and Negotiorum Gestio*, (Oxford, OUP, 2005), pp. 26–27.

can have ‘consequences’, *i.e.* can cause something”.<sup>89</sup> Thus, the ability to satisfy the objective element, which turns upon causation, is the same for both omissions and inactions; either both omissions and inactions are capable, or both are incapable, of constituting complicity.

### 3.2.3 Do Positive Obligations Indicate a Capacity to Influence?

If positive obligations do in some way address the causation-omissions issue, then perhaps this is because their presence is indicative of the capacity to influence a situation, and allows a failure to act to be seen as the factual cause of a harm.<sup>90</sup> Depending on the interpretation of the subjective element of Article 16, capacity to influence may be an important determination in whether an omission or inaction is sufficient to invoke complicity.<sup>91</sup> If the subjective requirement is modified by the primary norm violated, then this will be the case.<sup>92</sup> Ordinarily, however, the standard for violation of positive obligations, not complicity, will be capacity to influence.<sup>93</sup> In any event, there is no reason why that issue cannot be addressed directly, thus eschewing the unnecessary evidential detour through positive obligations.

### 3.2.4 Does a Breach of Positive Obligations Increase Culpability?

Another way in which it has been suggested that positive obligations justify the imposition of responsibility for complicity is that a failure to act, which breaches an obligation, is highly culpable. In this vein, Jackson opines that complicity should include “particularly culpable omissions, specifically those where the accomplice state had knowledge of the wrongful act and failed to act in breach of such a specific obligation”.<sup>94</sup> This may be an important consideration in international criminal law or domestic criminal law systems, but without a clear cut, general rule, the role of fault in State responsibility is less clear.<sup>95</sup> Reference instead is variously made to the

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<sup>89</sup> M. Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics*, (Oxford, OUP, 2009), p. 141.

<sup>90</sup> Jackson, *supra* note 14, at p. 40.

<sup>91</sup> *See text, supra* note 84.

<sup>92</sup> *See* section 1.4.

<sup>93</sup> M. Hakimi, ‘State Bystander Responsibility’, 21 *European Journal of International Law* (2010), p. 366.

<sup>94</sup> Jackson, *supra* note 14, p. 142.

<sup>95</sup> A. Gattini, ‘Smoking/No Smoking: Some Remarks on the Current Place of Fault in the ILC Draft Articles on State Responsibility’, 10 *European Journal of International Law* 1999, pp. 397 – 404; Jackson, *supra* note 14, at p. 159.

primary norm which the complicit acts aid (which of course will differ from case to case) or a knowledge requirement which does not assess fault.<sup>96</sup> Thus, fault or culpability in its current manifestation in Article 16 is not a sufficiently sound basis for the justification of complicity by omission.

In short, the relationship between positive obligations and complicity is not one of facilitation. Given that omissions do not offend the constitutive elements of Article 16 and do not require positive obligations to facilitate their being complicit conduct, does international law recognise complicity by inaction? This question will be addressed in section four. But first, in the context of questions over the utility of complicity, the interrelation of positive obligations and complicity requires examination.

### 3.3 The Distinct Nature of Complicity by Omission

In the *Corfu Channel* case the ICJ addressed Albania's responsibility for the damage caused to two UK vessels by mines laid in an international waterway in the Corfu strait. The UK submitted that the mines were either laid with the knowledge or connivance of Albania, or alternatively, that Albania came to know of their having been laid. Either way, Albania, according to the UK, failed to warn other States of their existence.

In holding Albania responsible, the ICJ articulated a general due diligence obligation consisting of "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".<sup>97</sup> A general principle of due diligence, or a general positive obligation, had already been affirmed as early as 1925 in the *Spanish Zones* case, which established "the responsibility for events which may affect international law and which occur in a given territory"<sup>98</sup> as a corollary of sovereignty. Again, three years later in the *Islands of Palmas* award, it was held that States have the obligation "to protect within the territory the rights of other States".<sup>99</sup> Additionally, the *Trail Smelter* award in 1938 elucidated what is now a cornerstone of international environmental law; namely, that "no State has the right to use or permit use of its territory in such a manner as to cause injury by fumes in or to the territory of

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<sup>96</sup> Aust, *supra* note 1, p. 235.

<sup>97</sup> The *Corfu Channel* case, *supra* note 20, p. 22.

<sup>98</sup> *British Claims in the Spanish Zone of Morocco Case*, 1 May 1925, R.I.A.A II. 649.

<sup>99</sup> *Islands of Palmas case (Netherlands v. USA)*, 4 April 1928, R.I.A.A. II 838.

another”.<sup>100</sup> This general positive obligation has been supplemented over time by an increasingly comprehensive positive obligations regime.<sup>101</sup> Specific obligations can be found in human rights law, as embodied in obligations to protect and fulfil, in the Geneva Conventions, and in environmental law.

In addition to a growing prevalence and coverage, some authors argue that there is a judicial preference for positive obligations over complicity. This was the case in *Corfu Channel*, where the ICJ favoured drawing upon a concept of positive obligations to finding Albania complicit in the wrongful act of another.<sup>102</sup> The overlap is further evidenced by the fact that the State practice referred to in the Commentary to Article 16 appears to exemplify violations of positive obligations as well. In this vein, Corten and Klein commented: “Whenever complicity can be established, the principle of due diligence has been breached; the principle of due diligence can be breached in numerous situations where complicity... cannot be established”.<sup>103</sup> In addressing this view, the following section will answer two questions: has the normative reach of positive obligations grown so extensive as to fully encompass complicity, or does complicity possess a distinct character?<sup>104</sup> And, given that positive obligations seem to offer a less challenging route to responsibility and appear more manageable, where the concepts overlap, does the concept of complicity retain any utility?<sup>105</sup>

### 3.3.1 Differentiating Between Positive Obligations and Complicity

In *Bosnia* the ICJ outlined two perceived differences between complicity and positive obligations. First, that complicity is engaged by positive act whereas responsibility for breach of positive obligations accrues by omission; and second, that the two have disparate subjective

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<sup>100</sup> *The Trail Smelter Case (Canada v. United States)*, (1938 and 1941) R.I.I.A, III, p. 1965.

<sup>101</sup> Heathcote, *supra* note 81, p. 305. *See also*: Crawford, *supra* note 8, p. 405.

<sup>102</sup> Corten and Klein, *supra* note 11, p. 328.

<sup>103</sup> *Ibid.*, p. 331.

<sup>104</sup> Jackson, *supra* note 14, p. 131.

<sup>105</sup> *Ibid.*; Corten and Klein, *supra* note 11, p. 316.

thresholds.<sup>106</sup> This article challenges the first proposition generally. The second, in addition to several other conceptual differences, shall be dealt with below.<sup>107</sup>

### 3.3.1.1 Normative and Geographical Coverage

The general due diligence obligation upon which the argument is premised is not, in truth, all that general. Firstly, the normative coverage is limited; “it is only in relation to established rights that an obligation of due diligence is owed by one State to another”.<sup>108</sup> Any general due diligence obligation incumbent upon States to ensure that their territory is not used to the detriment of others is confined to environmental law, as per the *Trail Smelter* case;<sup>109</sup> and aggression, under Article 3(f) of the Definition of Aggression. Secondly, it is geographically limited; in *Corfu* Albania’s responsibility was engaged upon the basis of “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”.<sup>110</sup> However, Albania would not have been under an obligation to inform the British vessels if aware of mines in the Indian Ocean, for example, as “the *Corfu Channel* holdings concentrated on duties owed for harm realized in a state’s own territory”.<sup>111</sup> The archetypal situation of complicity, where “a State allows its territory to be used by another State for perpetrating an act of aggression against a third State”,<sup>112</sup> would therefore not engage responsibility under the due diligence principle. Rather, the territorial State would be responsible upon the basis of the norm specific complicity rule in the Definition of Aggression. Complicity then, may be thought of as a type of ‘primary meta-rule’,<sup>113</sup> as responsibility for complicity knows no geographical limitation, and need not attach to certain norms. There is clearly a disparity in the coverage of the concepts.

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<sup>106</sup> At para. 432.

<sup>107</sup> The claim that there is an overlap and that complicity is redundant only seems to sustain with real potency when the complicity in question is established by omission. This view is shared, albeit implicitly: *See*: Lanovoy, *supra* note 1, at pp. 146 – 147.

<sup>108</sup> Sarah Heathcote, *supra* note 81, p. 299.

<sup>109</sup> *The Trail Smelter Case*, *supra* note 100, p. 1905. As recently affirmed in *Pulp Mills on the River Uruguay* (*Argentina v. Uruguay*), Judgment, I.C.J. Reports 2010, at p. 14.

<sup>110</sup> *Ibid.*

<sup>111</sup> Nahapetian, *supra* note 9, at p. 125. *See also*: Jackson, *supra* note 14, pp. 130–132.

<sup>112</sup> Graefrath, *supra* note 46, p. 372.

<sup>113</sup> Jackson, *supra* note 14, p. 149.



### 3.3.1.2 The Existence of a ‘Primary Wrong’

In order to invoke complicity under Article 16, the primary wrong needs to actually occur. With conflicting jurisprudence on the matter, it is not clear that this is the case for positive obligations. In *Tehran*, it was held that the “inaction of the Iranian Government by itself constituted clear and serious violation of Iran’s obligations”.<sup>114</sup> But, later, in interpreting the positive obligations emanating from the Genocide Convention, the ICJ held that “a State can be held responsibility for breaching the obligation to prevent genocide only if genocide was actually committed”.<sup>115</sup> Again, as was previously suggested, it is not clear whether this determination is confined to those positive obligations arising out of the Genocide Convention. For complicity, conversely, the position is clear: the wrongful act of the principal must actually occur.<sup>116</sup>

### 3.3.1.3 Due Diligence Requires the Exercise of Control

Due diligence obligations appear to require a level of control that is not required for complicity.<sup>117</sup> This has frequently found manifestation in the territorial limitation of positive obligations of prevention. Accordingly, in *Corfu Channel* Albania violated its positive obligations because the act occurred on its territory, and was therefore treated as an act over which Albania exercised effective control. This requirement is not always strictly tethered to territory, however. In *Cyprus v. Turkey*, the ECtHR found that Turkey controlled and supported the Turkish Cypriot administration in Northern Cyprus without that administration being on Turkish territory.<sup>118</sup> There is no requirement that there was effective control over another State for the imposition of responsibility for complicity. Such control is more akin to the test for direct attribution under Article 8 ASR, as per the ICJ decision in *Nicaragua*.<sup>119</sup>

### 3.3.1.4 Level of *Culpa*

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<sup>114</sup> *United States Diplomatic and Consular Staff in Tehran*, Judgment, I.C.J. Reports 1980, at p. 3, para. 87.

<sup>115</sup> *Bosnia v. Serbia*, *supra* note 8, para. 431.

<sup>116</sup> This is an inherent quality of the concept of derivative responsibility, and implicit in Article 16. *See*: ASR Commentary, Article 16, para. 1.

<sup>117</sup> Gattini, *supra* note 9, p. 699.

<sup>118</sup> 2001, ECHR, no. 25781/94, para. 76.

<sup>119</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment. I.C.J. Reports 1986, at p. 14.

Despite the difficulty of discerning the contours of the subjective element of Article 16, it is clear that generally, the two concepts will impose different standards of behaviour; “‘capacity to influence effectively’ now emerges as an applicable standard for the obligation to prevent, whereas complicity requires ‘full knowledge of facts’”.<sup>120</sup> The result is a much lower threshold for due diligence obligations, which imposes responsibility “upon constructive knowledge or risk that the breach will occur”.<sup>121</sup> One of the primary targets for the academic criticism of Article 16 has been the subjective element.<sup>122</sup> Much of this criticism has centred on the difficulty of proving that a State possessed a certain state of mind; it will be challenging to determine whether a State really intended to facilitate an internationally wrongful act. In this sense, the constructive knowledge aspect of positive obligations provides a significant advantage; it will be much easier to show that there has been a violation of a positive obligation.

#### **3.3.1.5 Positive Obligations are Vague Concepts**

Complicity is a more rigid notion, which in some instances can be difficult to prove. Positive obligations, on the other hand, allow for consideration of policy questions that would not be relevant in assessing whether there is responsibility under Article 16.<sup>123</sup> In this sense, positive obligations can be seen as a useful residual method, allowing courts the latitude to establish responsibility “if they consider the result of a negative finding on responsibility to be unjust in other regards”.<sup>124</sup> This view confirms that, whilst positive obligations may refer to the same conduct, they can facilitate a much more fluid assessment.

#### **3.3.2 The Usefulness of Complicity**

Some of the differences between complicity and positive obligations outlined above demonstrate the continued usefulness of complicity. The greater normative coverage and lack of effective control requirement, for example, show that complicity can be established in instances where a breach of positive obligations of prevention could not. But the criticisms levelled at complicity,

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<sup>120</sup> Lanovoy, *supra* note 1, at p. 146.

<sup>121</sup> *Ibid.*, at p. 147

<sup>122</sup> *See* section 2.4.

<sup>123</sup> Aust, *supra* note 1, at p. 401.

<sup>124</sup> Hakimi, *supra* note 93, p. 366. *See also*: Aust, *supra* note 1, p. 403.

noted above, do carry some weight. It seems that given the increasing normative coverage of positive obligations, the instances in which only complicity responsibility is available will be somewhat reduced. But even where the two overlap, it is submitted that there is value in maintaining a separate concept of complicity.

Most notably, the two modes of liability have a different moral worth. Cassese, when referring to the finding that Serbia was not complicit in Genocide but had breached its positive obligation to prevent Genocide, called the ICJ's finding a mere 'consolation prize'.<sup>125</sup> Similarly, it has been recognised that complicity in the internationally wrongful act of another may "weigh more heavily" than a breach of a positive obligation.<sup>126</sup> This is particularly so in the example given above concerning US obligations owed to Iraq, and possible complicity in a use of force by Israel against Iran.<sup>127</sup> US complicity in an illegal use of force against Iran is a far more serious breach of international law than the violation of a technical rule in a bilateral treaty. Furthermore, complicity must be given a place in the law of State responsibility as States tend to articulate responsibility in terms of complicity, rather than by breach of a positive obligation; implicitly this feels like a neater and more accurate fit.<sup>128</sup> Importantly, complicity links certain acts together, noting that they form part of a larger whole. Showing that States played a role in US rendition and torture of suspected terrorists recognises the true nature of the large scale and systematic human rights violation. To view the assistance furnished by each individual State as a minor, separate wrong would be divorced from reality, and would constitute a gross misrepresentation of the situation.

These two modes of liability should not be seen as competitors, vying for recognition as the dominant imposer of liability, but rather as complements, each with "structural advantages (that) will play out in some circumstances and will have no relevance in others".<sup>129</sup> Thus the approach of the ICJ in *Corfu Channel* was not only justifiable, but was also sensible; complicity is perceived as a more serious form of violation, and recourse will be had to the functional

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<sup>125</sup> A. Cassese, A Judicial Massacre, *The Guardian Newspaper*, Tuesday 27 February 2007.

<sup>126</sup> Aust, *supra* note 1, p. 229.

<sup>127</sup> See section 3.2.1.

<sup>128</sup> Jackson, *supra* note 14, p. 131.

<sup>129</sup> Aust, *supra* note 1, p. 402.

alternative of positive obligations where complicity is not established on the facts.<sup>130</sup> But this does not mean that complicity is redundant, even in cases of overlap; the best should not be the enemy of the good.

#### 4 Complicity by Inaction

Thus far it has been shown that Article 16 does not exclude the possibility of complicity by omission, though it may be difficult to prove the causative link required for satisfaction of the material element. It has also been shown that complicity by omission is a concept distinct from positive obligations of prevention; the two are overlapping and reinforcing in some cases, but complicity, as a rule of general application, is wider and imposes responsibility separately. Given that positive obligations – the sole difference between omission and inaction – do not facilitate complicity by omission, this article will seek to examine the possibility of complicity by inaction. That is, the responsibility of a State for assistance in the internationally wrongful act of another, resulting from inaction, where the assister was not under a positive obligation to act. Returning to the scenario provided in the introduction, this concerns Scenario C, where State Y breaches no positive obligations to State Z.

It is clear that in Scenario A, State Y is responsible under Article 16. The positive granting of permission to refuel constitutes aid and assistance as it has a causative link to the internationally wrongful act of State X. In Scenario B, State Y will be responsible for the breach of a positive obligation under the common security and defence policy, in addition to incurring responsibility for complicity in the internationally wrongful act of X. This passivity is an omission – it is a non-doing contrary to the law – and thus it is capable of constituting aid and assistance under Article 16.<sup>131</sup> In Scenario C, there is no positive act which could fall within a traditional understanding of complicity, and no positive obligation was breached. However, it is submitted that there is no causative difference between the inaction in Scenario C and the omission in Scenario B; upon the application of a ‘but for’ causality test, the passivity in both situations has the same causative effect. Thus, if omissions are accepted as being capable of satisfying the requirements of Article 16, the same must be said of inactions.

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<sup>130</sup> Hakimi, *supra* note 93, p. 366.

<sup>131</sup> Aust, *supra* note 1, pp. 225–230.

The distinction between the three situations is not as large as it first appears. An acceptance of responsibility in Scenario A but not Scenario C would allow a recasting of the facts for the avoidance of responsibility. Rather than positively grant the use of territory (action), States can justify that which would otherwise be aid and assistance by knowingly failing to object to the use of their territory (inaction).<sup>132</sup> But, why should responsibility turn upon a deft manipulation of the facts? Is it acceptable that the authorisation of flyover rights would engage complicity, but acquiescence would not? Can the substitution of an active verb for a passive one be sufficient to avoid responsibility? Additionally, the distinction between Scenario B and Scenario C is somewhat illusory. It is not clear why the presence of a positive obligation of a different content and owed to a different State, is necessary to facilitate complicity.<sup>133</sup> Should responsibility rely upon the existence of what may only be a trivial and indirectly related positive obligation? This article submits that permitting these distinctions is logically absurd and conceptually ill-founded, and that consequently international law should impose responsibility for complicit inactions. This claim finds support in the fact that inaction is able to meet the criteria set out in Article 16, it may be culpable, it is similar to pre-existing concepts, and features in State practice on aid and assistance.

#### 4.1 The Wrongfulness of Inaction

To claim that inaction, as opposed to action or omission, is never wrongful, is akin to claiming that actions which themselves are not internationally wrongful acts are never wrongful. But this is precisely the function of derivative responsibility. The sale of weapons is not in and of itself an internationally wrongful act, but the consequences of this act (the contribution to an internationally wrongful act), combined with the subjective and opposability requirements, furnish the act with a character of wrongfulness. Therefore, on this basis, there cannot be a rejection of culpable inactions in the law of international responsibility, *a priori*. In this regard it is important to again note the central assumption and ethos of derivative responsibility under Article 16; namely, that “responsibility is ascribed for behaviour which is not *per se* unlawful”.<sup>134</sup> Indeed, draft Article 25 stated explicitly that: “the conduct in question (the

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<sup>132</sup> Lanovoy, *supra* note 1, p. 147.

<sup>133</sup> See section 2.2.1.

<sup>134</sup> Aust, *supra* note 1, p. 238.

assistance) would not otherwise be internationally wrongful”.<sup>135</sup> The assistance is wrongful, not because it breaches a primary norm, but because of the contribution it makes to the breach of a primary norm by the State receiving the assistance.

As established above, the role of fault in the law of State responsibility is, notwithstanding, a rather uncertain ground upon which to found or dismiss the possibility of responsibility.<sup>136</sup> In any event, it is not immediately clear that inaction is never culpable. Culpability, it seems to the present author, must be assessed with reference to the subjective element. In Scenario C State Y is geographically located between State X and State Z. With modern military technology, and the huge figures spent on defence systems, State Z could not possibly be attacked without State Y knowing of the attack and permitting the use of its territory or airspace for this purpose. Thus, unless State Y was labouring under some misunderstanding of State X’s intentions, or was unable to object to the use of their territory, State Y must be morally responsible for aiding and assisting an internationally wrongful attack on State Z. With full knowledge of the facts and an ability to act, this inaction must be considered culpable. This is arguably even more so if the *only* way that State Z could be attacked was through State Y. It is difficult to see how Lesotho could be attacked without the culpable involvement of South Africa, for example.

## 4.2 Legal Recognition of Responsibility for Inaction

Responsibility for ‘pure omissions’ is not an entirely new concept. Whilst complicity “imposes negative obligation(s) beyond simply prescribing the consequences of the breach of any given primary norm”, complicity by inaction would mimic the effect of imposing positive obligations; requiring States to act in a certain way.<sup>137</sup> Such responsibility would be equivalent to responsibility for a failure to enforce legal rights; State Y is responsible as, knowing of State X’s wrongful intention, State Y failed to enforce its legal right (territorial sovereignty), to the detriment of State Z. Similarly, couched in the language of positive obligations, a limited recognition of State bystander responsibility, which bears some resemblance to complicity by inaction, has been placed in a framework by Hakimi.<sup>138</sup> Founded in human rights obligations of

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<sup>135</sup> Ago, Seventh Report, *supra* note 19, para. 60.

<sup>136</sup> See section 2.2.4.

<sup>137</sup> Lanovoy, Revisiting, *supra* note 44, at p. 2.

<sup>138</sup> Hakimi, *supra* note 93, pp. 341–385.

protection, Hakimi argues that State bystander responsibility, which would engage on the basis of inaction, arises due to a State's relationship with the abuser and the kind of harm caused.<sup>139</sup> Whilst both State bystander responsibility and complicity by inaction are concerned with the responsibility for passivity, bystander responsibility has limited application to inter-State relationships, and is based on positive obligations, not the 'secondary rules' of State responsibility.<sup>140</sup> Limited forms of bystander liability also exist in domestic tort systems. In England and Wales, a defendant that had a special relationship to the plaintiff,<sup>141</sup> created the source of the danger,<sup>142</sup> induced the plaintiff's reliance,<sup>143</sup> or exercised control over the danger or source of the danger,<sup>144</sup> may be exposed to bystander liability.<sup>145</sup> This final ground is not based on a special relationship, a prior wrongful act by that defendant, or positive obligations, but is imposed due to the fact that the defendant could have prevented the harm, and chose not to. Thus, though complicity by inaction, as a derivative form of responsibility, is conceptually distinct from these primary rules, there is limited common ground between the two in the rationale employed, and conduit through which responsibility is imposed.

### 4.3 State Practice

Perhaps the most compelling argument for the recognition of complicity by inaction lies in the claims of States themselves. On numerous occasions States have noted the damage that can be caused by inaction, as opposed to omission (which in itself is wrongful). Returning to the opening example, State reactions to the treatment of terrorist suspects in the aftermath of the 11 September 2001 attacks are again instructive. In 2001 the UN Security Council passed resolution 1373, which prohibited State support of entities or persons engaged in terrorist acts, noting explicitly both active and *passive* support.<sup>146</sup> In published internal governmental investigations

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<sup>139</sup> *Ibid.*, p. 355.

<sup>140</sup> *Ibid.*, p. 363.

<sup>141</sup> *Barnes v. Hampshire County Council* [1969] 3 All ER 746.

<sup>142</sup> *Johnson v. Rea* [1961] 1 WLR 1400 at 1405.

<sup>143</sup> *Hedley Byrne & Co. v. Heller & Partners Ltd* [1964] AC 465 at 495.

<sup>144</sup> *Goldman v. Hargrave* [1967] 1 AC 645.

<sup>145</sup> This type of liability is also known as the 'duty to rescue'. See J. Kortmann, *supra* note 88, generally; and D. Husak, 'Omissions, Causation and Liability', 30 *The Philosophical Quarterly* 1980, pp. 318–326.

<sup>146</sup> S/RES/1371 (2001), para. 2(a).

into allegations of complicity in torture and renditions, several States demonstrated an increasing acceptance that inaction, or passivity, can invoke international responsibility. The Dutch government, for example, in denying having played a role in abductions, stated that it had “no knowledge of such abductions and ha[d] not been involved in such abductions either actively or passively”.<sup>147</sup> The UK parliamentary commission considered that responsibility for complicity would be engaged “if the UK is demonstrated to have a general practice of passively receiving intelligence information which has or may have been obtained under torture”.<sup>148</sup> Likewise, a Council of Europe report found that “even acquiescence and connivance of the authorities in the acts of foreign agents affecting convention rights might engage the State party’s responsibility”.<sup>149</sup>

Based on the foregoing, there are good reasons to recognise complicity by inaction. The material element presents a substantial challenge to the concept as it will be difficult to show that passivity had a causal effect. But this limitation applies equally to omissions, which have received partial, if not wholesale, recognition in international law, and are accepted as having causes in various other legal systems.<sup>150</sup> Complicity by inaction would impose responsibility founded on an ability to avert harm, where the failure contributes to an internationally wrongful act, and the ‘assister’ in-acted with a view to facilitating this wrongful act. At its most narrow, complicity by inaction would resemble an *ex ante* form of the obligations of non-assistance under Article 41(2) ASR regarding peremptory norms.<sup>151</sup>

## 5 Conclusion

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<sup>147</sup> Reproduced in: P. C. Tange, ‘Netherlands Municipal Legislation Involving Questions of Public International Law’, 38 *Netherlands Yearbook of International Law* 2007, p. 289.

<sup>148</sup> Joint Committee on Human Rights, *supra* note 64, para. 42.

<sup>149</sup> Council of Europe, ‘Report of the Secretary General on the Use of His Powers under Article 52 of the ECHR’, SG/ING (2006) 5, at para. 23. <<https://wcd.coe.int/ViewDoc.jsp?id=976731&Site=COE>> last accessed 17/03/16

<sup>150</sup> See section 2.3.2.

<sup>151</sup> A full discussion of the interesting interplay of Article 16 and Article 41 is beyond the scope of this paper. See: Aust, *supra* note 1, pp. 319–376. *N.b.*: This does not suggest that there is any relationship between complicity by inaction and the ‘responsibility to protect’; complicity by inaction does not give rise to an obligation to use force to prevent an internationally wrongful act as this would be outside the “limits permitted by international law”. See: *Bosnia v. Serbia*, *supra* note 8, para. 430; and Milanovic, *supra* note 1, p. 687.



By establishing that the concept does not offend the constitutive elements of complicity in the ASR, this article has demonstrated the potential for responsibility for complicity by omission. It has shown how complicity by omission can and should be seen a concept distinct from breach of positive obligations of prevention, and taking this reasoning one step further has speculated on the possibility of complicity by inaction.

Culpable passivity, as well as activity, should be fully included within the law of State responsibility. Such inclusion would enhance the doctrinal coherence, and ensure that conduct that facilitates a wrongful act is treated as such, without the need for recourse to the ‘consolation prize’ of positive obligations. The limited recognition of contributions to the maltreatment of terrorist suspects post 11 September 2001 is but a start to the creation of a cohesive derivative responsibility regime that can fully reconcile the disparities in moral and legal culpability. Though international law prohibits complicity by commission and by omission, it fails to acknowledge those situations where “through one's inaction one decisively contributes to the creation of conditions that enable (a wrongful act)”.<sup>152</sup> To reduce and nullify the reprehensible effects of unchecked State coordination, and to encourage respect for the international rule of law, complicity must evolve further. In doing so it must recognise the manner in which States function in varying degrees of cohesion, moving beyond a mere recognition of active complicity. As Article 16 in its current interpretation is unfit for this purpose, the resort to vague and ill-suited positive obligations is unsurprising. This is lamentable, as such a function should not be, and need not be, beyond the purview of the law of State responsibility.

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<sup>152</sup> Cassese, *supra* note 125.